No. 80-378

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MICHAEL RODAK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHRYSLER CORPORATION, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND DOUGLAS M. COSTLE, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld an order of the Administrator of the Environmental Protection Agency, issued under Section 207(c)(1) of the Clean Air Act, requiring Chrysler to recall 208,000 1975 model year cars where, following adjudicatory proceedings, the Administrator determined that:

(1) at least 62-79% of the recall class cars were violating federal carbon monoxide emission standards;

(2) the violations were occurring because of misadjustments in the carburetor fuel-air mixture; and

(3) the pervasive misadjustments were the foreseeable result of Chrysler's emission system design and service procedures.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is not yet reported. The decision and order of the Administrator of the Environmental Protection Agency (Pet. App. 67a-124a) are not reported. The decision and order of the administrative law judge (Pet. App. 125a-211a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 212a-213a) was entered on June 19, 1980. The petition for a writ of certiorari was filed on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 207(c)(1) of the 1970 Clean Air Act,[1] 42 U.S.C. 1857f-5a(c)(1), provides:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 202, when in actual use throughout their useful life [5 years or 50,000 miles], he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall

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[1] The recall order under review was first issued on December 8, 1976, pursuant to the 1970 Clean Air Act and before the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.* The 1977 Amendments recodified the Act but did not change the statute as it bears on this case. In this brief we shall refer to the sections of the 1970 Act as originally codified.

provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2).

STATEMENT

1. Carbon monoxide is an imperceptible and poisonous gas; motor vehicles are the single most important source of carbon monoxide pollution.[2] Under Section 202 of the Clean Air Act, 42 U.S.C. 1857f-1, the United States Environmental Protection Agency (EPA) established pollution control standards prohibiting 1975 model year cars from emitting more than 15 grams of carbon monoxide per mile. 38 Fed. Reg. 10317, 10319 (1973). At least 62-79% of the 1975 model year Chrysler cars here in issue violated that standard (Pet. App. 27a, 106a, 196a).

Following extensive tests demonstrating that the recall class cars were violating the carbon monoxide emission standard because of widespread misadjustments of the carburetor idle mixture of the vehicles, the Administrator

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[2]See 2 *A Legislative History of the Clean Air Amendments of 1970*, 93d Cong., 2d Sess. 1414, 1428 (Comm. Print 1974). See also H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 263 (1977).

of EPA issued an order under Section 207(c)(1) of the Act, 42 U.S.C. 1857f-5a(c)(1), directing a recall of the cars (Pet. App. 27a, 67a, 125a).[3] Chrysler requested a hearing on the recall order before an administrative law judge. After adjudicatory proceedings, the administrative law judge ordered Chrysler to submit a recall plan (*id.* at 125a-211a).

On Chrysler's administrative appeal, the Administrator found that a combination of factors in Chrysler's design and service procedures had led to the widespread misadjustments and the unusually high failure rates in the recall class cars.[4] First, Chrysler's service procedure fostered misadjustments because it was cumbersome and time consuming, and required the use of infrared analyzers, sophisticated diagnostic tools which were generally unavailable and frequently malfunctioned (Pet. App. 10a-14a, 87a, 89a-90a, 203a-204a). Second, the screw Chrysler provided for adjusting the fuel-air mixture was overly sensitive (*id.* at 14a-15a, 90a). One-twentieth of a turn above Chrysler's specified adjustment produced large increases in the idle carbon monoxide concentration, and one full turn produced an idle carbon monoxide level approximately 23 times higher than the level that would meet the standard (*id.* at 14a).[5] Third, the limiter cap

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[3] The statute requires the manufacturer to "submit a plan for remedying the nonconformity" and to notify car owners of the nonconformity. 42 U.S.C. 1857f-5a(c)(1). We loosely refer to these requirements as "recall" requirements.

[4] Chrysler suggests (Pet. 22) that a 1978 study found that such misadjustments and failures were industry-wide. On the contrary, the data underlying the study revealed that the average idle carbon monoxide emission level for all 1975 Chrysler cars was 3.87%, almost double that of the average for the remainder of the industry (Pet. App. 39a-40a, 60a).

[5] Most of the idle mixture screws used by other manufacturers were substantially less sensitive (Pet. App. 17a-18a).

Chrysler placed on the idle adjustment screw did not limit adjustment to the manufacturer's specifications but rather permitted adjustments almost ten times greater than the settings specified (*id.* at 15a, 18a, 88a, 102a-103a, 207a).[6] Finally, and most significantly, the cars as designed generally did not operate satisfactorily when the carburetor was adjusted to Chrysler's specifications because the specified fuel-air mixture was too "lean" (*i.e.*, the proportion of fuel to air was too low) for acceptable "driveability." When set as specified, the cars surged, stalled, hesitated, and had rough idle or other driveability problems (*id.* at 15a-17a, 85a-88a, 205a-206a).[7] Upon review of these facts the Administrator determined that the misadjustments were "encouraged or fostered" by Chrysler's defective system design and service procedures, and that Chrysler should have foreseen the possibility of widespread misadjustments resulting from its faulty design and adjustment procedures (*id.* at 75a).

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[6]Subsequently promulgated regulations make it unlikely that this problem will recur. The new regulations require pre-sale testing for emission standard compliance not just at the fuel-air adjustment level specified by the manufacturer, but anywhere in the adjustable range of the idle mixture screw. 44 Fed. Reg. 2960 (1979). The pertinent portions of these regulations are effective for 1981 model year cars. 40 C.F.R. 86.081-22(e)(1) and (2); 40 C.F.R. 86.081-29. See Pet. App. 51a.

[7]Instead of relying on a lean fuel-air mixture, Chrysler could have achieved compliance with the emission standard and at the same time alleviated the "driveability" problems by installing air pumps in the recall class of cars (Pet. App. 7a-9a, 84a-85a, 206a-208a). Chrysler had considered but rejected the use of air pumps. In 1973, when planning for the 1975 model year cars, Chrysler tested 100 1974 model year cars, half with air pumps and half without. The tests showed that the cars with air pumps complied with emission standards but the cars without air pumps did not because of widespread misadjustments (*id.* at 62a).

The Administrator acknowledged that the key issue in the proceeding was whether the recall class cars were "properly maintained" within the meaning of Section 207(c)(1) (Pet. App. 68a). He rejected Chrysler's argument that the vehicles were not "properly maintained" because the nonconformance with the emission standard was attributable to misadjustments of the carburetor idle mixture contrary to the manufacturer's specifications. Instead, he concluded (*id.* at 81a) that "Congress did not intend the manufacturer to escape responsibility for in-use emission nonconformities if the manufacturer itself brought about the condition of misadjustment." Accordingly, the Administrator interpreted Section 207(c)(1) as requiring EPA to establish by affirmative evidence "that the vehicles would be maintained in accordance with the manufacturer's written instructions *but for the actions of the manufacturer*" (Pet. App. 82a; emphasis in original). Because such a showing was made in this case and because the other statutory requirements were also met, the Administrator ordered Chrysler to submit a recall plan within 30 days (*id.* at 124a).

On Chrysler's petition for review, the court of appeals affirmed the Administrator's order (Pet. App. 1a-66a). The court concluded as follows (*id.* at 66a):

> In sum, we agree with the Administrator's interpretation of Section 207(c)(1) of the Clean Air Act, * * * that a manufacturer may be held responsible in a recall action for nonconformities resulting from misadjustments, if such misadjustments were principally caused by the design of the emission control system and maintenance procedures, and if the manufacturer foresaw or should have foreseen the problem and failed to take available steps to obviate it. We find substantial

evidence in the record to support the Administrator's conclusion that Chrysler vehicles in the recall class fail to conform to federal carbon monoxide emission standards when in actual use, although properly maintained and used, and thus that Chrysler must submit a plan for remedying the nonconformity, in accordance with the Act.

ARGUMENT

Petitioner does not appear seriously to dispute the Administrator's determination—affirmed by the court of appeals—that through its defective design and service procedures Chrysler was responsible for the fuel-air mixture misadjustments that caused the violations of the carbon monoxide emission standard. There is, in any event, no reason for further review of this factual determination. See *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), slip op. 5 n.6; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

Instead, petitioner contends that the court of appeals and the Administrator misconstrued the "properly maintained" language of Section 207(c)(1) by making the automobile manufacturer responsible for nonconformities caused by misadjustments primarily attributable to design defects knowingly produced by the manufacturer. This issue of statutory construction is not of sufficient continuing importance to warrant review by this Court. The issue arises from the application of one part of one section of the Clean Air Act in an unusual factual setting involving the recall of fewer than 210,000 five-year-old cars. In addition, as the court of appeals observed (Pet. App. 40a), this is the first contested recall action under Section 207(c)(1) to reach the courts; there are no similar cases awaiting judicial review. Moreover, the issue is unlikely to recur in this particular context because EPA

has promulgated new regulations that require 1981 model year vehicles to pass federal emission standards even when misadjusted (see note 6, *supra*). In any event, the decision below is correct, and does not conflict with any decision of this Court or any other court.

In essence, petitioner's argument is that the phrase "properly maintained" used in Section 207(c)(1) of the Clean Air Act, 42 U.S.C. 1857-5a(c)(1), was intended to bar recall of cars failing to maintain emission standards where such failure is due to misadjustments, even though the misadjustments are attributable to the manufacturer's design defects. This argument was correctly rejected by the court of appeals, in a thorough opinion on which we rely.

After carefully reviewing the language, history and purpose of the statute, the court of appeals affirmed the Administrator's interpretation of "properly maintained" as used in Section 207(c)(1) (Pet. App. 40a-51a).[8] The court disagreed with petitioner's contention that "properly maintained" must necessarily be interpreted as referring to the requirement, in the warranty provision of the statute (Section 207(b)(2)(A), 42 U.S.C. 1857f-5a(b)(2)(A)), that the vehicle be maintained in accordance with the manufacturer's written instructions furnished with each

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[8]Citing *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980), petitioner contends (Pet. 14) that the court of appeals and the Administrator erred in going beyond the statutory language to examine the statute's history and purpose. But the Court in *Harrison* concluded that in the absence of legislative history to the contrary, there was no need to construe the statute in a manner inconsistent with its plain language. Slip op. 10. Here, the court below concluded that the statutory language was open to several plausible interpretations, and that the history and purpose of the legislation supported the view that Congress intended manufacturers to be liable for recall if the design defects of the manufacturer were responsible for poor maintenance resulting in emission standard violations.

new vehicle pursuant to Section 207(c)(3), 42 U.S.C. 1857f-5a(c)(3) (Pet. App. 41a-44a). The court noted (*id.* at 42a) that, unlike Section 207(b)(2)(A), Section 207(c)(1) does not expressly refer to the manufacturer's instructions. It also observed that there are significant differences between a warranty action and a recall action and that, in light of these differences, Congress may have intended the "properly maintained" language applicable to recall actions to be given a more flexible interpretation than the maintenance requirement under the warranty provision (Pet. App. 42a-43a). In addition, the court pointed out that the phrase "when in actual use" in Section 207(c)(1) suggests that Congress was concerned with everyday conditions, and that if—as the Administrator found—Chrysler's design and maintenance procedures encouraged or fostered improper maintenance, the Administrator was not precluded by Section 207(b)(2)(A) from ordering a recall (Pet. App. 44a).[9]

Turning to the history and purpose of the statute, the court noted that the recall provision was added to the Clean Air Act in 1970 "to give auto manufacturers an incentive to design and construct their emission control systems to meet standards in actual use" (Pet. App. 49a). Before that date, the Act required only production and prototype tests (*id.* at 44a-45a). The court concluded that the "properly maintained" language was incorporated in

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[9]In support of its argument, petitioner cites (Pet. 11, 13) an opinion of EPA's General Counsel issued in 1972 and recently published. 1 *United States Environmental Protection Agency, General Counsel Opinions*, "Air Pollution" 105, 111 (1979). That opinion, however, does not address the question whether a vehicle is not "properly maintained" under Section 207(c)(1) if, as the Administrator found in this case, the faulty maintenance is the "inevitable byproduct" (Pet. App. 82a) of the manufacturer's defective system design and maintenance procedures.

the recall provision of the statute to free the manufacturer of the financial burden of a recall when the failure to meet emission standards was caused by reasons beyond the manufacturer's control (*id.* at 44a-51a). However, the language was not intended to relieve the manufacturer of liability whenever owners had failed to maintain their cars strictly in accordance with the manufacturer's precise written instructions, regardless of the underlying reasons for the maintenance failures. Where, as here, the manufacturer was in fact responsible for the defects that ultimately caused the maintenance failures, the court decided that the manufacturer may be held responsible under the Act. We submit that this interpretation is a fair and reasonable reading of the Act's recall provision.

Finally, as the court of appeals observed (Pet. App. 49a-50a), if petitioner's interpretation were accepted, auto manufacturers would have little incentive to design emission systems that would operate effectively while in actual use. "The manufacturer could prescribe maintenance that is difficult to perform or incompatible with smooth operation of the vehicles, but bear no responsibility for the natural consequence of such design—so long as the vehicles passed the initial certification tests. We could expect little or no progress in development of better, more maintenance-free emission controls" (*id.* at 50a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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